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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 443

RUTH B. DROWN, AN INDIVIDUAL, TRADING AS DROWN LABORATORIES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and Associates Justices of the Supreme Court of the United States:

Summary Statement of Matter Involved

Petitioner was convicted of unlawfully causing to be introduced and delivered for introduction into interstate commerce a misbranded device, in violation of the Federal Food, Drug and Cosmetic Act, Section 331 (a) of Title 21 U. S. C. A. The United States Court of Appeals for the Ninth Circuit affirmed the conviction based upon a finding that an intrastate retail sale and delivery of the device to the purchaser (consumer) nevertheless constituted "a delivery for introduction into interstate commerce" by

reason of the fact that the seller had knowledge of the non-residence of the purchaser and the invoice of the sale contained the out-of-state address of the purchaser to whom the device (unwrapped and uncrated) was personally delivered within the state of the seller, and after which the purchaser transported the device to his home.

Basis of Jurisdiction of Supreme Court

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 10, 1952 (R. 31). Time for filing Petition for Writ of Certiorari was extended to November 8, 1952, by Order of this Court (R. 72). The jurisdiction of this Court is invoked under Title 28 U. S. C. A. Section 1254 (1).

Questions Presented

The ultimate question of jurisdiction of the Federal Court in this case is dependent on the determination of the questions:

1. Whether a retail intrastate sale to a consumer becomes "interstate commerce" by the purchaser subsequently transporting the misbranded device to another state;

2. Whether the "interstate" character of commerce is determined by the knowledge which the seller had as to the intent of the purchaser to transport the misbranded device to another state;

3. Whether "delivery for introduction into interstate commerce" as used in the Federal Food, Drug and Cosmetic Act, Section 331 (a), Title 21 U. S. C. A., is to be given a different construction as applied to "interstate commerce" than such phrase bears under other Federal acts.

Reasons Relied On for Allowance of Writ

The Court of Appeals for the Ninth Circuit decided important questions which have not been, but should be, settled by this Court:

1. Whether Congress, in providing that Section 331 (a) Title 21 U. S. C. A., of the Food, Drug and Cosmetic Act, which prohibits "*delivery for introduction into interstate commerce* of any food, drug, or cosmetic that is adulterated or misbranded", in the exercise of its power to regulate interstate commerce, intended to extend that act to wholly intrastate activities; and

2. What constitutes "delivery for introduction into interstate commerce."

The Court of Appeals decided that said Section 331 (a) Title 21 U. S. C. A., applies to any sale "where transportation to another state by either the purchaser or seller is contemplated by the parties." This decision, as applied to the isolated retail sale here involved, not only extends the regulatory power of Congress to wholly intrastate activities without relation to any direct or substantial effect on interstate commerce; but the decision makes the determination of the "interstate" character of the commerce depend upon "intention" or "contemplation" of shipment rather than the actual start of "transportation in a continuous route or journey," in conflict with the recent decision of this Court in the case of *Empresa Siderurgica, S. A.* v. *Merced*, 337 U. S. 154, 69 S. Ct. 995, 93 L. Ed. 1276.

The Court of Appeals based its determination of the interstate character of the commerce upon the fact that the sale invoice carried the out-of-state adress of the purchaser, which is in conflict with earlier decisions of this Court that the circumstance of billing of the transaction does not de-

termine the essential character of the commerce. This principle was announced by this Court in the cases of *Treasury of Indiana* v. *Wood Preserving Corp.*, 313 U. S. 62, 85 L. Ed. 1188; *Superior Oil Co.* v. *State of Miss.*, 280 U. S. 390, 50 S. Ct. 169, 74 L. Ed. 504, 507; *Western Oil Ref. Co.* v. *Lipscomb*, 244 U. S. 346, 37 S. Ct. 623, 61 L. Ed. 1181; *Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U. S. 257, 48 S. Ct. 107, 72 L. Ed. 270, and numerous earlier decisions of this Court. While none of these decisions involved the application of the Food, Drug and Cosmetic Act, this Court should announce the principle that the term "interstate commerce" should be uniformly construed, whether the immediate question before the Court pertains to a state power to tax property or regulate a certain activity, or the power of the Federal Government to regulate or control the activity involved under any Federal Act.

It is also important that this Court draw the line of demarcation between state and federal control of retail sales, as a more definite guide to the lower courts in the application of the Food, Drug and Cosmetic Act, so that the lower courts may draw a distinction between an isolated remote sale, as in the case at bar, having no direct or substantial effect on interstate commerce and a regular course of conduct as in the case of *United States* v. *Sanders*, 196 F. (2d) 895 (10th Cir.), which distinction the Court of Appeals for the Ninth Circuit failed to recognize in its decision in this case.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment

of the Court of Appeals may be reversed by this Honorable Court and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

ROLLIN L. MCNITT,
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EDYTHE JACOBS,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 443

RUTH B. DROWN, AN INDIVIDUAL, TRADING AS DROWN LABORATORIES,

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vs.

UNITED STATES OF AMERICA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion Below

The Opinion of the United States Court of Appeals for the Ninth Circuit was filed September 10, 1952 and is reported in 198 F. (2d) 999. The Opinion is printed in full in the record (R. 19).

Jurisdiction

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 U. S. C. A. The Court of Appeals for the Ninth Circuit in this case reviewed and affirmed the Judgment of the United States District Court for the Southern District of California. The affirming decision is

subject to review by the Supreme Court of the United States upon certiorari.

This case involves an important question of Federal law which has not been, but should be, settled by this Court. The Court of Appeals for the Ninth Circuit has decided Federal questions in this case in a way probably in conflict with applicable decisions of this Court (Supreme Court Rule 38(5)(b)).

Judgment was entered in this case by the United States Court of Appeals on September 10, 1952 (R. 31). Time for filing Petition for Writ of Certiorari in this Court was extended to November 8, 1952 (R. 72).

Statement of the Case

The facts in this case, insofar as material to the jurisdictional commerce questions here presented, are included in a stipulation of facts filed in the within case (R. 15).

Petitioner, Ruth B. Drown, resides and does business under the name of Drown Laboratories, at Hollywood, California. Edgar C. Rice, a resident of Illinois, employed at Chicago, Illinois, and at Los Angeles, California, personally purchased from Drown Laboratories at Hollywood, California, a device known as "Drown Radio Therapeutic Instrument", taking said instrument with him from the premises of Drown Laboratories, unwrapped and uncrated. The sale invoice shows the Illinois address of purchaser Rice, as well as the fact that the invoice price included "Sales Tax" (applicable to local sales in California (R. 39) (Exhibit 1)).

Purchaser Rice transported the device from Hollywood, California, to his home in Blue Island, Illinois, where his wife used said device. Six months prior to such purchase by Rice, in California, petitioner Drown had examined Mrs. Rice at Chicago and recommended treatments with

such a device, and such treatments were administered by a Chicago, Illinois physician for several months prior to the purchase of such device in California by Rice.

More than two years later, in January, 1951, the information was filed in the within case, based upon said sale to Rice in October, 1948, charging Petitioner Drown with violation of the Federal Food, Drug and Cosmetic Act, in unlawfully causing to be "introduced and delivered for introduction into interstate commerce at Los Angeles, California," said device, charged to be misbranded (R. 1).

Petitioner moved to Dismiss the information upon the ground that the aforesaid sale to Rice "was intrastate and was not the introduction and delivery for introduction of said instrument into interstate commerce", and "the same is not within the jurisdiction" of said Court (R. 5). The Trial Court denied the motion (R. 6), and the case proceeded to trial by jury on the information and plea thereto and judgment of conviction was entered on October 22, 1951 (R. 10). On appeal the conviction was affirmed (R. 31).

For purpose of argument of questions presented in Petition for Writ of Certiorari, it will be assumed that said device is without merit and that the labeling thereof constituted misbranding within the meaning of the Federal Food, Drug and Cosmetic Act.

Specification of Errors

The United States Court of Appeals erred in affirming the judgment of conviction:

1. In ruling that the case was within the jurisdiction of the Federal Court;
2. In ruling that "interstate commerce" has a broader meaning in statutory interpretation where public health or welfare is involved in the application of the statute to a particular transaction;

3. In ruling that Congress, having the power to regulate intrastate activities, intended to exercise that power by the adoption of Section 331(a), Title 21 U. S. C. A.;

4. In ruling that the Federal Food, Drug and Cosmetic Act applies to an intrastate transaction where "transportation to another state by either the purchaser or seller is contemplated";

5. In ruling that a retail intrastate sale to an ultimate consumer may constitute "delivery for introduction into interstate commerce" within the meaning of Section 331(a), Title 21 U. S. C. A., where:

(a) The seller contemplates that purchaser would take the device to his out-of-state home; and

(b) The sale invoice showed the out-of-state home address of the purchaser.

6. In ruling that an isolated retail sale constitutes interstate commerce, where the purchaser transports the article to another state.

Summary of Argument

I. Jurisdiction under the Federal Food, Drug and Cosmetic Act depends upon the relationship the misbranded drug bears to interstate commerce.

II. A retail intrastate sale and delivery of a misbranded device does not become "interstate commerce" by subsequent transportation thereof to another state by the purchaser.

III. The fact that interstate movement is contemplated does not constitute a retail intrastate sale a delivery for introduction into interstate commerce under the Food, Drug and Cosmetic Act.

ARGUMENT

I

Jurisdiction Under the Federal Food, Drug and Cosmetic Act Depends upon the Relationship the Misbranded Drug Bears to Interstate Commerce.

(Note: The Federal Food, Drug and Cosmetic Act is sometimes referred to herein merely as Food and Drug Act.)

Jurisdiction of the Federal Court in this case rests upon construction of the phrase "delivery for introduction into interstate commerce", as used in Section 331 (a) of Title 21 U. S. C. A. Pointing out that Congress has "the power to regulate wholly intrastate activities because of their relation to or effect upon interstate commerce", the Court of Appeals, in its opinion below, concludes that such power includes the power to regulate the sale of a drug or device "within one state *where transportation to another state* by either the purchaser or seller *is contemplated*" and that Congress did exercise such power over intrastate sales of drugs and devices by reason of inclusion in said Section 331 (a) of the expression "delivery for introduction into interstate commerce". (Emphasis ours.)

This Court has stated the rule of construction of criminal statutes in *Kordel* v. *United States,* 335 U. S. 345, 69 S. Ct. 106, 93 L. Ed. 52, that "a criminal statute is not to be read expansively to include what is not plainly embraced within its language." In that case the Court had before it the question of construction of Section 331 (k) of Title 21 U. S. C. A., wherein Congress expressly extends the Federal jurisdiction to intrastate transactions, creating the offense of misbranding of a drug "while such article is held for sale *after* shipment in interstate commerce". The express

language of Section 331 (k) presents little difficulty in construing the legislative intent to extend Federal jurisdiction to intrastate situations where drugs or devices have come to rest within a state "after shipment in interstate commerce", as the phrase "held for sale" implies an unambiguous status of the article of commerce.

However, in the case at bar, the situation conversely involves a sale of a device (as defined in the Food and Drug Act) *before* shipment in interstate commerce, and the pertinent inquiry is: to what extent did Congress intend to exercise its power to control such intrastate transaction.

This Court stated the purposes of the Food and Drug Act and its various subdivisions, in the case of *United States* v. *Walsh*, 331 U. S. 432, 67 S. Ct. 1283, 91 L. Ed. 1585, at 1587:

> "The Federal Food, Drug, and Cosmetic Act rests upon the constitutional power resident in Congress to regulate interstate commerce. To the end that the public health and safety might be advanced, it seeks to keep interstate channels free from deleterious, adulterated and misbranded articles of the specified types. *United States v. Dotterweich*, 320 U. S. 277, 280, 88 L. Ed. 48, 51, 64 S. Ct. 134. It is in that interstate setting that the various sections of the Act must be viewed."

At p. 1588, this Court stated:

> "In other words, § 301 (a) (21 U. S. C. A. 331 (a)) is directed to illegal interstate shipments, * * *"

In the dissenting opinion, in the *Kordel* case, *supra*, Mr. Justice Black points out that "the Federal Food, Drug and Cosmetic Act creates several offenses each of which separately depends upon the relationship the misbranded drug then bears to interstate commerce". This Court also stated the purpose of the Food and Drug Act in

the case of *United States* v. *Sullivan*, 332 U. S. 689, 68 S. Ct. 331, 92 L. Ed. 297:

> "Its purpose was to safeguard the consumer by applying the Act to articles from the moment of their introduction into interstate commerce all the way to the moment of their delivery to the ultimate consumer."

Recognizing that jurisdiction of the Federal Court rests upon the relationship of the misbranded article to interstate commerce, the Court below construed the expression "delivery for introduction into interstate commerce" to apply to an intrastate sale where transportation out of state is "contemplated". Whether "contemplation of transportation to another state" is synonomous with "delivery for introduction into interstate commerce" will be hereinafter discussed; suffice it at this point to state, that there must be some substantial relationship between interstate commerce and the sale of the misbranded device, for the Food and Drug Act to apply.

II

A Retail Intrastate Sale and Delivery of a Misbranded Device Does Not Become "Interstate Commerce" by Subsequent Transportation Thereof to Another State by the Purchaser.

In the *Walsh* case, *supra*, this Court points out that Section 301 (a) (21 U. S. C. A. 331 (a)) does not carry over the interstate limitation. Nonetheless, with nobility of purpose, "protection of the public health", in ruling on the jurisdictional question in the instant case, the courts below failed to view the Food and Drug Act in its relation to "interstate commerce", and applied the Act to the retail *intrastate* sale of the misbranded device to the ultimate consumer, holding such sale to be a violation of the act by

reason of the knowledge by the seller of the out-of-state residence of the purchaser.

The question of validity of such ruling on the facts involved in this case presents two problems:

(1) Whether a retail intrastate sale to a consumer becomes "interstate commerce" by the purchaser subsequently transporting the misbranded device to another state;

(2) Whether the "interstate" character of commerce is determined by the knowledge of the seller as to the intent of the purchaser to transport the article to another state.

The answer to the first problem lies in the definition of the term "commerce." The labyrinth of learned logic contained in the numerous decisions expounding on "commerce" leads ultimately to the fundamental definition in the early case of *Phila. & Reading Co.* v. *Penna.*, 15 Wall 232, 21 L. Ed. 146, that "commerce", as contemplated by the United States Constitution, is "the bringing of the goods from the seller to the buyer." Where, as in the instant case, the article of sale had been directly delivered to the ultimate consumer in the state of sale, "commerce" has ended, and there was no longer any transaction to which the Federal jurisdiction can apply.

In the case of *Weigle* v. *Curtice Bros. Co.*, 248 U. S. 285, 39 S. Ct. 124, 63 L. Ed. 242, involving the relative spheres of regulation under the Federal Food, Drug and Cosmetic Act and a state act prohibiting sale of food products containing certain chemicals, the Court held that the Federal Food Drug and Cosmetic Act did not control "selling at retail" articles which had been shipped in interstate commerce. Mr. Justice Holmes there stated, (63 L. Ed. 250):

> "But all this has nothing to do with the question when interstate commerce is over and the articles carried in it have come under the general power of the

state. The law upon that point has undergone no change.

"The Food and Drug Act indicates its intent to respect the recognized line of distinction between domestic and interstate commerce too clearly to need argument or an examination of its language. It naturally would, as the distinction is constitutional. * * * Neither the silence of Congress nor the decisions of officers of the United States have any authority beyond the domain established by the Constitution. * * * When objects of commerce get within the sphere of state legislation, the state may exercise its independent judgment and prohibit what Congress did not see fit to forbid. When they get within that sphere is determined, as we have said by the old long established criteria. *The Food and Drug Act does not interfere with state regulation of selling at retail.* * * * (citing cases) *Such regulation is not an attempt to supplement the action of Congress in interstate commerce, but the exercise of an authority outside of that commerce that always has remained in the states.*" (Emphasis ours.)

To extend the application of the Federal Food and Drug Act to intrastate retail sales to consumers before shipment out-of-state by the consumer would not only extend the sphere of Congressional regulation to encompass all intrastate transactions involving articles defined by the Act, but would create endless conflicts between State and Federal agencies. If the subsequent transportation to another state can convert an intrastate retail sale to "interstate commerce", it requires little imagination to comprehend the limitless control of the Federal Food and Drug Authority, over intrastate transactions. Every retail intrastate sale would be subject to examination by the Federal Agency to ascertain whether the purchaser had transported the article across state lines, and if misbranded, then the seller would be charged with violation of the Act. A purchaser

of a misbranded article could confer jurisdiction on the Federal agency by stepping across state lines. Such application of the Act could lead to state border patrols by the Federal Agency to ascertain whether misbranded articles are being transported by individuals from one state to another.

When the retail sale has been consummated by the delivery of the article to the purchaser, the seller loses control of that article. If the subsequent transportation to another state by the retail purchaser of the article confers Federal jurisdiction under the Food and Drug Act for misbranding of an article defined by the Act, then the seller can be charged with violation of the Act by reason of conduct of another person beyond the control of the seller.

That transportation alone to another state does not convert an intrastate sale to "interstate commerce", unless such transportation is at the instance and expense of the seller, is the gist of the ruling of this Court in the case of *Treasury of Indiana* v. *Wood Preserving Corp.*, 313 U. S. 62, 85 L. Ed. 1188, in which case the seller of railroad ties in an intrastate sale transported the ties to its creosoting plant in another state for treatment pursuant to contract with purchaser; cost of transportation was paid by the purchaser, and this Court held the transaction was not interstate commerce but was taxable in the state of sale, though transported out of state at the instance and expense of the purchaser.

In the case of *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160, this Court held that "the Federal regulatory power in matters relating to interstate commerce ceases when commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins."

As commercial intercourse ceases on delivery to the purchaser by a seller of the article sold, where such delivery

is personally made in an intrastate sale, commercial intercourse then ceases and there is then no commerce to which the Federal regulatory power may attach under the Federal Food and Drug Act or any other Federal Act.

III

The Fact That Interstate Movement Is Contemplated Does Not Constitute a Retail Intrastate Sale a Delivery for Introduction Into Interstate Commerce under the Food, Drug and Cosmetic Act.

That a retail sale consummated wholly within the limits of a state does not constitute interstate commerce should appear too clear for argument. It remains then to consider the question whether such sale is converted to "interstate commerce" by reason of knowledge of the seller that the purchaser contemplates the taking of the article into another state.

In the recent case of *Empresa Siderurgica, S. A.* v. *Merced*, 337 U. S. 154, 69 S. Ct. 995, 93 L. Ed. 1276, this Court stated (at p. 1279):

> "'. . . goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey.' * * *
>
> "* * * *it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it.*"

This Court reasoned, at p. 1280:

> "It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed

for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.

"So in this case it is not enough that on the tax date there was a purpose and plan to export this property. Nor is it sufficient that in due course that plan was fully executed. Part of the plant that is taxed was dismantled, but it had not been delivered to any carrier for export or otherwise started on its journey on the tax date. It might still have been diverted into the domestic market. The fact that any such diversion would entail a breach of contract, that a part of the plant had already started on its export journey, that an export license had been obtained and letter of credit deposited in this country increases the expectation on the tax date that exportation of the entire plant would eventuate. But *that prospect, no matter how bright, does not start the process of exportation.* On the tax date the movement to the foreign shores had neither started nor been committed." (Emphasis ours.)

Applying this reasoning to the facts in the case at bar, when the misbranded device was delivered to the retail purchaser in California, "unwrapped and uncrated", (R. 16), such delivery did not start the process of shipment out-of-state, however much the seller, petitioner herein, may have contemplated that the nonresident purchaser would probably transport the device to his home in Illinois. The purchaser, Rice, could have diverted the device to his use in California without shipment to another state. That the seller regarded the sale of the device here involved as a local transaction for domestic use would appear from the fact that the sale invoice shows that the California Sales Tax was added to the purchase price (Ex. 1, R. 39). A sale to an out-of-state consumer, shipped in interstate commerce, is exempt from California Sales Tax; the charge of the tax may therefore be considered at least on the question whether the transaction here involved was interstate commerce.

In the case of *Minnesota* v. *Blasius*, 290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131, this Court held:

> "Where property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be part of the general mass of property within the State and is thus subject to its taxing power."

This Court also held in that case:

> "If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it."

The same constitutional limitations apply to the power of Congress to regulate under the Food and Drug Act as apply to the power to withdraw property from state taxation under the regulation of commerce by Congress. The reasoning of this Court in that regard is expressed in the case of *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160, wherein the Court stated:

> "That commodities produced or manufactured within a state are intended to be sold or transported outside the state does not render their production or manufacture subject to federal regulation under the commerce clause. As this court said in *Coe* v. *Errol*, 116 U. S. 517, 526, 29 L. Ed. 715, 718, 6 S. Ct. 475, 'Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State?' *It is true that this was said in respect of a challenged power of the State to impose a tax; but the query is equally pertinent where*

> *the question, as here, is with regard to the power of regulation.* * * *
>
> "In *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259, 260, 67 L. Ed. 237, 243, 43 S. Ct. 83, *we held that the possibiltiy, or even certainty of exportation of a product or article from a state did not determine it to be in interstate commerce before the commencement of its movement from the state.* To hold otherwise 'would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof', wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production.'" (Emphasis ours.)

The Court of Appeals based its ruling that the sale to Rice involved in this case constituted "delivery for introduction into interstate commerce", upon mere conclusions and inferences as follows:

> "The appellant knew the device was to be used to treat a lump in Mrs. Rice's breast, and it is obvious that she contemplated that Mr. Rice would take the device back to his Illinois home. The invoice of sale states that the instrument was sold to 'Mr. Edgar Rice, 13005 Greenwood Ave., *Blue Island, Illinois.*'"

It is well established by earlier decisions of this Court that "the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce and not by mere billing."

> *Superior Oil Co.* v. *State of Miss.*, 280 U. S. 390, 50 S. Ct. 169, 74 L. Ed. 504, 507;

Western Oil Ref. Co. v. *Lipscomb,* 244 U. S. 346, 37 S. Ct. 623, 61 L. Ed. 1181;
Atlantic Coast Line R. Co. v. *Standard Oil Co.,* 275 U. S. 257, 48 S. Ct. 107, 72 L. Ed. 270;

In *Railroad Commission* v. *Worthington,* 225 U. S. 101, 32 S. Ct. 653, 56 L. Ed. 1004, this Court held that the test of through billing is not necessarily determinative of the character of the commerce. In the more recent case of *Treasury of Indiana* v. *Wood Preserving Corp., supra,* this Court declared that the circumstances of billing was of no consequence in the light of the facts showing completed delivery to the purchaser in the state of sale.

In the *Carter Coal Co.* case, *supra,* this Court declared that "the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

The Court of Appeals, in its determination that the mere knowledge of the seller "that the purchaser intends to introduce the device into interstate commerce by taking it into another state" constitutes "delivery for introduction into interstate commerce," claims support for such statutory interpretation in the opinion of the Tenth Circuit in the case of *United States* v. *Sanders,* 196 F. (2d) 895. While we believe that the statutory construction of the Tenth Circuit Court in *Sanders* case, based upon the "illegal transportation of liquor" cases, is not a sound interpretation of the Food and Drug Act; nonetheless, the *Sanders* case may be deemed to be a borderline case where there was a regular course of traffic or commercial intercourse between citizens of different states constituting "commerce." In the *Sanders* case, there had been a prior injunction against Sanders who had engaged "runners" or "drummers" who went into other states to solicit orders for the misbranded drug. After the injunction Sanders

only sold to purchasers, who came to his place of business, many of them from other states.

The Tenth Circuit Court held:

> "If Appellee *knowingly and regularly* sold misbranded drugs and delivered them, knowing that they were purchased for transportation in interstate commerce, and solicited customers to return for future purchases and deliveries, he was guilty of a violation of the Act." (Emphasis ours.)

In the case at bar, however, there is involved only a single isolated sale, more than two years prior to the filing of the information. In the case of *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, 46 S. Ct. 376, 70 L. Ed. 750, this Court held that the mere chance shipment from one state to another of cotton purchased and sold on an exchange in spot transactions does not convert the purely local agreements, or the transactions to which they relate, into subjects of interstate commerce.

The reasoning of the Court in the case of *Superior Oil Co.* v. *Miss. ex Rel. Knox, supra*, would seem more applicable than the *Sanders* case, *supra*, to the facts in the case at bar. Mr. Justice Holmes there stated:

> "The importance of the commerce clause to the Union, of course, is very great. But it also is important to prevent that clause being used to deprive the states of their lifeblood by a strained interpretation of facts. We may admit that this case is near the line. There was a regular course of business known to the appellant, that took the gasoline into another state, and if by mutual agreement the oil had been put into the hands of a third person, a common carrier, for transportation to Louisiana, the mere possibility that the vendor might be able to induce the carrier to forego his rights might not have been enough to keep the transaction out of interstate commerce. (* * *) But here the gasoline was in the hands of the purchaser to do

with as it liked, and there was nothing that in any way committed it to sending the oil to Louisiana except its own wishes. If it had bought bait for fishing that it intended to do itself, the purchase would not have been in interstate commerce because the fishing grounds were known by both parties to be beyond the state line. A distinction has been taken between sales made with a view to a certain result, and those made simply with indifferent knowledge that the buyer contemplates that result. * * *

"* * * It is a matter of proximity and degree as to which minds will differ, but it seems to us that the connection of the seller with the steps taken by the buyer after the sale was too remote to save the seller from the tax. Dramatic circumstances, such as a great universal stream of grain from the state of purchase to a market elsewhere, may affect the legal conclusion by showing the manifest certainty of the destination and exhibiting grounds of policy that are absent here."

The decision in the case at bar is without precedent not only in its determination that a retail consummated intrastate sale constitutes interstate commerce by reason of subsequent transportation of the article, but in ruling that mere knowledge of nonresidence of the purchaser can change the character of the transaction to "interstate commerce". It is important that such erroneous statutory construction of the Food and Drug Act be overruled and that this Court declare that Congress intended merely to exercise its regulatory powers under that Act upon "interstate commerce" and transactions substantially and directly affecting such commerce, and that the Food and Drug Act does not encompass all intrastate transactions dealing with the subjects of that Act.

Conclusion

Midst the cacophony of clamour for "states' rights" by those who regard the Federal Government as a mere interloper and of the steady drone for the "welfare state" by

those who look upon State Government as a local police force existing by federal abstinence, stands this Court as a silent bulwark protecting the line of demarcation between State and Federal Government. In a world divided between the extremes of a powerful "police-state" on the one side and defenseless sovereignties on the other, stands only the rampart of moral and physical strength which our constitutional system of government can muster. It is, therefore, of high importance that this Court should seize every opportunity to guard against any threat to that system of dual government from which stems the moral stamina of this great nation.

Where a federal agency assumes jurisdiction over a private intrastate transaction, having no direct or substantial effect upon interstate commerce, merely under the guise of "public health and safety", as in the case at bar, the time has come for this Court to redefine the constitutional limitation on federal authority. No better example can be found for a declaration of the limits of the federal regulatory power over the individual lives and transactions of the citizens of the different states of the union, than in the instant case, where a "welfare" statute is involved.

A Writ of Certiorari should be granted to settle the important questions here involved and resolve the conflict between the decision of the Court of Appeals for the Ninth Circuit and the decisions of this Court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 443

RUTH B. DROWN, AN INDIVIDUAL, TRADING AS DROWN LABORATORIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 19-30) is reported at 198 F. 2d 999.

JURISDICTION

The judgment of the Court of Appeals was entered on September 10, 1952 (R. 31). An order of October 6, 1952, by Mr. Justice Douglas extended the time for filing a petition for certiorari to November 8, 1952 (R. 72), and the petition for certio-

rari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the sale in California of a medical device, misbranded by false and misleading labeling, to an Illinois resident with the seller's knowledge that the buyer would take it to Illinois for use there, constituted "delivery for introduction into interstate commerce" within the prohibition of Section 301(a) of the Federal Food, Drug, and Cosmetic Act.

STATUTE INVOLVED

Section 301 of the Federal Food, Drug, and Cosmetic Act, Act of June 25, 1938, 52 Stat. 1040, *et seq.*, 21 U.S.C. 331, provides:

> The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

STATEMENT

Petitioner was charged in a one-count information with violating the Federal Food, Drug, and Cosmetic Act by causing a misbranded device known as a "Drown Radio Therapeutic Instrument" to be delivered for introduction into interstate commerce (R. 1-4). The jury found petitioner guilty, and she was sentenced to pay a $1,000

fine (R. 7, 9-10). On appeal the Court of Appeals unanimously affirmed the conviction (R. 11, 31).

The device sold by petitioner was represented as capable of eliminating a lump in the breast and preventing cancer therefrom, and as efficacious in treating bladder, kidney, heart and many other diseases. The sufficiency of the government's evidence to establish misbranding is not contested.

The pertinent facts with respect to the sale of the instrument which culminated in petitioner's conviction may be summarized as follows:

Mrs. Rice, who resides in Blue Island, Illinois, had been examined in April 1948, by her family doctor, who suspected a possible carcinoma and suggested an immediate biopsy (R. 15, 36, 63). On April 23, 1948, petitioner, then at the Stevens Hotel in Chicago, examined Mrs. Rice with one of her instruments. Believing that the lump was not a cancer but a fungus growth, petitioner recommended treatments with one of her instruments at the office of a Dr. John in Chicago. This recommendation was followed. Petitioner subsequently examined Mrs. Rice again in September, 1948, and recommended continued treatments, which were administered by Dr. John until October, 1948. (R. 15, 35-36, 50, 54-55.)

On October 28, 1948, Mr. Rice, who made frequent trips to California (R. 15), went to petitioner's office in Hollywood and purchased a Drown Radio Therapeutic Instrument, Model #98 M 10274817. He received a paid invoice (Ex. 1)

for a total of $412.00 including $12.00 sales tax, which stated that the instrument was sold to "Mr. Edgar Rice, 13005 Greenwood Avenue, Blue Island, Illinois." At the time of the purchase, Mr. Rice took the literature obtained from the Drown Laboratories explaining the use of the instrument (Exs. 2, 3, and 10) and returned to Blue Island where his wife discontinued the treatments by Dr. John. Instead she used the purchased instrument to treat the lump in her breast, for approximately one year. (R. 15-16, 36, 37, 45-46, 53.)

Thereafter petitioner made several diagnoses of Mrs. Rice while petitioner was in Hollywood and Mrs. Rice was in Blue Island (R. 16, 37, 38, 60).

ARGUMENT

Petitioner's sole contention is that the sale here involved was completely an intrastate transaction, so that Section 301(a) of the Federal Food, Drug, and Cosmetic Act (hereinafter called the Act), prohibiting the "introduction or delivery for introduction into interstate commerce" of a misbranded device, was not applicable.

We submit, however, that the evidence clearly showed that petitioner delivered the misbranded instrument to Mr. Rice for introduction into interstate commerce. Not only does the invoice show that petitioner knew that the instrument was being sold for delivery to Chicago, but the whole course of conduct among the parties shows that the sale of the instrument was part of a continuous, interstate, remote control diagnosis and treatment of Mrs.

Rice by petitioner.[1] The fact that the sale was made directly to Mr. Rice for personal use in his immediate family does not prevent the transaction from being one in interstate commerce. Cf. *United States* v. *Simpson,* 252 U.S. 465; *United States* v. *Hill,* 248 U.S. 420.

The issue here presented in relation to the Food and Drug Act was decided against petitioner's contention in *United States* v. *Sanders,* 196 F. 2d 895 (C.A. 10), certiorari denied, Oct. 13, 1952, No. 183 this Term. In ruling on the sufficiency of a complaint for criminal contempt for violation of an injunction against the interstate sale of misbranded drugs, the court there held that, if the defendant sold misbranded drugs within a state, knowing that they were purchased for transportation to other states in interstate commerce, he was guilty of a violation of the Act. Petitioner attempts to distinguish the *Sanders* case on the ground that there six different transactions were alleged (Pet. 21-22), but as the court below stated (R. 25):

> The Sanders case, however, does not turn on the nature of the seller's business, but rather

[1] Petitioner (Pet. 20-21) cites decisions to the effect that determination of the kind of commerce involved depends upon its essential character, and not upon mere billing. Cf. *Atlantic Coast Line R. Co.* v. *Standard Oil Co.,* 275 U.S. 257, 268: "The question whether commerce is interstate or intrastate must be determined by the essential character of the commerce, and not by mere billing or forms of contract, although that may be one of a group of circumstances tending to show such character." Here the circumstances establish the fact that the sale was for introduction into interstate commerce.

> upon whether the seller had knowledge that the misbranded drugs would be taken out of the state. The Act does not require a business; it prohibits *each* sale in violation of the statutory prohibition. 21 U.S.C.A. 331(a) [Section 301(a) of the Act].

Congress undoubtedly has power to regulate deliveries of goods for introduction into interstate commerce. Where goods are purchased in one state for transportation to another, the commerce includes the purchase as much as it does the transportation. *Currin* v. *Wallace,* 306 U.S. 1, 10; *Shafer* v. *Farmers Grain Co.,* 268 U.S. 189, 198; *Lemke* v. *Farmers Grain Co.,* 258 U.S. 50, 54-55; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282, 290. The place where title passes is not of controlling significance in determining whether or not there has been interstate movement. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U.S. 453, 463; *National Labor Relations Board* v. *Levaur,* 115 F. 2d 105, 108-109 (C.A. 1), certiorari denied, 312 U.S. 682. And it is established that Congress has power to regulate wholly intrastate activities by reason of their relation to or effect upon interstate commerce. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 227-235; *Wickard* v. *Filburn,* 317 U.S. 111, 122-125; *United States* v. *Wrightwood Dairy Co.,* 315 U.S. 110, 119-120.

Moreover, the purpose of the Act to protect the public health and safety of the people, by keeping

the channels of interstate commerce free from adulterated and misbranded articles, has been recognized. *United States* v. *Walsh,* 331 U.S. 432, 434; *United States* v. *Dotterweich,* 320 U.S. 277, 280. Bearing this in mind and giving a realistic meaning to the phrase "delivery for introduction into interstate commerce," it is apparent that Congress intended to prohibit a seller from delivering a misbranded device to a buyer, where, as here, the seller knows that the buyer intends to introduce the device into interstate commerce by taking it into another state.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY, 1953.

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